



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 21, 1997

Mr. Chris Oldner
Assistant District Attorney
Collin County Courthouse
210 S. McDonald, Suite 324
McKinney, Texas 75069

OR97-2560

Dear Mr. Oldner:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 110350.

The Collin County Criminal District Attorney's Office (the "district attorney") received a request for all information relating to the arrest, investigation, and trial of Darrell Lee Shirrls for aggravated robbery and aggravated sexual assault. You contend that most of the responsive documents are not subject to the act because they are grand jury records. In the alternative, you contend that the documents are excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

The act does not apply to information within the actual or constructive possession of the grand jury. Open Records Decision No. 513 (1988). When an individual or entity acts at the direction of a grand jury as the grand jury's agent, information prepared or collected by the agent is within the grand jury's constructive possession. *Id.* Information not held or maintained in this manner is not exempt from the act's coverage and may be withheld only if one of the act's specific exceptions applies to the information. *Id.*

Information obtained pursuant to a grand jury subpoena issued in connection with this investigation is within the grand jury's constructive possession and is not subject to the act. *Id.* See also Gov't Code § 552.003. However, not all of the submitted documents can be deemed to be within the constructive possession of the grand jury. The district attorney's investigation began before any information was submitted to the grand jury. Furthermore, it does not appear that the grand jury formally requested or directed all of the district attorney's actions in this investigation. The fact that information collected or prepared by the district attorney is submitted to the grand jury, when taken alone, does not mean that the

information is in the grand jury's constructive possession when the same information is also held by the district attorney. *Id.* We, therefore, must consider whether any of the exceptions you have claimed apply to the information not within the constructive possession of the grand jury.

You claim that the submitted documents are excepted from disclosure under the "litigation exception." Section 552.103(a) excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The district attorney has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The district attorney must meet both prongs of this test for information to be excepted under section 552.103(a).

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) at 4 and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4. After reviewing your arguments, we conclude that you have not demonstrated that litigation is pending or reasonably anticipated; therefore, you may not withhold the submitted documents under section 552.103.

You claim that section 552.111 excepts the requested information from disclosure. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. After reviewing the submitted documents, we have determined that they do not concern policymaking and may not be withheld under this exception.

Next, you contend that some of the documents are excepted under section 552.108. Section 552.108 provides in part:

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

It does not appear nor do you explain how the release of the requested information would interfere with law enforcement or prosecution. Therefore, we conclude that the district attorney may not withhold the information at issue under section 552.108(a)(1).

You assert, however, that some of the documents come within the purview of section 552.108(a)(3). Upon review of the submitted information, we conclude that some of the documents were either prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation, or reflect the mental processes or legal reasoning of an attorney representing the state. Therefore, we conclude you may withhold the marked documents under section 552.108(a)(3).

We note, however, that information normally found on the front page of an offense report is generally considered public. *See* Gov't Code § 552.108(c); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). In this case, front page offense report information that identifies the sexual assault victims must be withheld from disclosure under section 552.101 of the Government Code. *See infra* common-law privacy discussion. On the other hand, you must release all front page offense report information that does not identify the sexual assault victims, even if this information is not actually located on the front page of the offense report.

We note that some of the submitted documents contain information that is confidential by law. Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by

judicial decision. This section also encompasses the common-law right to privacy. Information is protected by the doctrine of common-law privacy if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Additionally, in this particular case, information identifying sexual assault victims is protected by common-law privacy. See Open Records Decision No. 339 (1982). Therefore, you must withhold the marked information from public disclosure under section 552.101 in conjunction with the common-law right to privacy.

Some of the submitted documents are confidential by statute. The documents we have marked as medical records appear to be within the scope of the Medical Practice Act (the "MPA"), V.T.C.S. article 4495b, Section 5.08(b) of the MPA provides as follows:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

The documents marked as medical records may be released only in accordance with the MPA. Open Records Decision No. 598 (1991). See V.T.C.S. art. 4495b, § 5.08(c), (j).

Some of the submitted documents contain criminal history information, which must be withheld from disclosure pursuant to section 552.101 of the Government Code. Criminal history information obtained from the National Crime Information Center or the Texas Crime Information Center is generally confidential by law. 28 C.F.R. § 20; Gov't Code § 411.083. Criminal history information that has been compiled by a governmental entity is protected by the common-law right to privacy. See *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989).

You also argue that the submitted documents contain driver license information which is excepted from disclosure under section 552.130 of the Government Code. We agree. The Seventy-fifth Legislature added section 552.130 to the Open Records Act which governs the release and use of information obtained from motor vehicle records. Section 552.130 provides in relevant part as follows:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

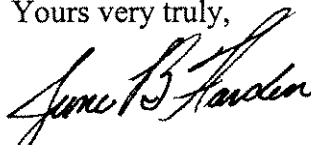
(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]

Therefore, you must withhold the driver's license information pursuant to section 552.130.

Finally, we note that a number of the submitted documents are court records. Documents filed with the court are public documents and must be released. *See Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57-58 (Tex. 1992).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/glg

Ref.: ID# 110350

Enclosures: Marked documents

cc: Ms. Roxanne M. Gonzalez
T.S. Francis & Associates
P.O. Box 443
Wylie, Texas 75098
(w/o enclosures)